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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-809

MICHAEL JOHN GRASSI, JR., *Petitioner,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 21, 1979

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No.

MICHAEL JOHN GRASSI, JR., *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Michael John Grassi, Jr. respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in the proceedings on September 19, 1979 and October 24, 1979.

OPINION BELOW

The opinion and order denying rehearing and rehearing *en banc* in the Court of Appeals, reported at 602 F.2d 1192, appear in the appendix to this brief. The District Court did not render any written opinions in this case.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on Sep' nber 19, 1979. A timely petition for rehearing and timely petition for rehearing *en banc* were denied without opinion on October 24, 1979. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the government imposed an illegal prior restraint by appropriating presumptively protected first amendment material for over two years without obtaining a judicial determination of obscenity, requiring the remedy of suppression?

2. Whether the government's seizure of the films from a private person and warrantless view of the films over two months later constituted an illegal search and seizure in violation of the fourth amendment?

3. Whether a trial judge commits harmful error in failing to inform the jury that children are not to be considered in determining the community standard of obscenity?

4. Whether the government must accept the defendant's offered stipulation that the films are obscene where there is no probative value to the films other than a showing of obscenity and the films are highly prejudicial?

5. Whether the government's closing argument that

defendant was a tax evader and hired women for massage parlors, which was irrelevant, unsupported by an evidence and only sought to establish bad character, was harmful error?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amend. 1, U.S. Const.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amend. 4, U.S. Const.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fed. R. Evid. 403

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Michael John Grassi, Jr. requests this Court to grant certiorari and consolidate his case with those of his codefendants in which this Court has already granted certiorari.

Grassi was convicted of violating 18 U.S.C. §371 for knowingly conspiring to use a common carrier to ship obscene materials interstate in violation of 18 U.S.C. § 1462 and knowingly transporting obscene materials interstate for the purpose of sale and distribution in violation of 18 U.S.C. §1465.

Grassi worked for Arthur Sanders, William Walter and Trans World America, Inc. a/k/a TWA, Inc. Grassi, Sanders, Walter and TWA were indicted together with another corporation, Gulf Coast News Agency, Inc., for violations arising out of the same incident. Grassi, Sanders and Walter filed motions to suppress on the same grounds. The motions were heard simultaneously and denied. Grassi's case was then severed from those of the other defendants. Grassi's codefendants were tried separately and their convictions were affirmed by the Fifth Circuit. *United States v. Sanders,* 592 F.2d 795 (5th Cir. 1979). Walter, Sanders, Gulf and TWA filed petitions for writs of certiorari which this Court granted on October 1 and 15, 1979, Case Nos. 79-67, 79-148.[1] Although Grassi was tried separately,

[1]Walter's and Sanders' cases were consolidated sua sponte by this Court and Petitioners' briefs on the merits are due November 29. Oral argument has not been set. If this Court grants certiorari in this case, Grassi would be able to file his brief on the merits at a time which would not delay oral argument.

there are two common issues in the cases: (1) the propriety of the search and seizure outlined in questions 1 and 2 above; and (2) the propriety of the jury instruction which failed to inform the jury that children are not to be considered in determining community standards. A copy of the decision of the Court of Appeals for the Fifth Circuit in Walter's and Sanders' case is included in the appendix to this petition.

Sanders and Walter operated a conglomerate of adult bookstores which included the TWA corporation. Grassi worked for the TWA operation in Atlanta. In September 1975, Sanders and Walter told Grassi that they wanted certain films shipped from Miami to Atlanta. Grassi called an employee in Miami, Richard Larson, and told him to ship the films to Atlanta. When the boxes did not arrive in the next few days, Grassi tried to locate them. Larson told him that the boxes had been shipped to Leggs, Inc., a fictitious name, with a fictitious return address. The fictitious name was used because the defendants had previously encountered problems with pilfering of their shipments.

The cartons had been shipped to Greyhound in Atlanta on a "Will Call," but Greyhound mistakenly sent them to a branch station near L'Eggs Products, Inc. L'Eggs is a women's hosiery manufacturer and a regular customer of that branch. When the shipment arrived the branch called L'Eggs to pick up its package. L'Eggs' employees did so. When they opened one of the boxes, they discovered the films. The cartons had all been tightly sealed. The films were also individually wrapped inside and taped. The film boxes were labelled with the name of the film and a detailed description of its contents. When they realized the contents of the cartons, the L'Eggs employees called the FBI, who came and picked them up five days later.

Grassi attempted to locate the cartons through Greyhound on a number of occasions but was unsuccessful. Finally, acting on a hunch, he called L'Eggs. He was told that the cartons had been turned over to the FBI.

The FBI never obtained a warrant to seize or view the films. The agents picked up the boxes on October 1, 1975. They held the films, but did not look at them, until December. The government never sought a warrant to authorize its view of the films. It never sought judicial review of the films' contents to authorize its holding of them for two years until trial.

Grassi and the other individual defendants filed motions to suppress the films. The trial court did not reach the merits of the motions to suppress because it ruled that defendants did not have standing under traditional fourth amendment analysis. Grassi did not specifically contest that ruling on appeal because the Fifth Circuit had just ruled in a related case that Sanders and other TWA officers and employees in Grassi's position had no standing. Grassi stated in his brief in the Fifth Circuit that:

> The issue of whether the Motion to Suppress was properly denied has not been presented because of the recent decision of *United States v. Busch,* 582 F.2d 1016 (5th Cir. 1978) which holds that Appellant had no standing; if, however, this decision is overruled or reconsidered, the Appellant specifically reserves the question of whether he has standing to challenge the search and seizure of the films in the instant case.

Brief of Appellant at 1, n.1.

At trial, the government sought to establish that Grassi knowingly participated with the principals of TWA, Inc. in a conspiracy to transport obscene movies from Florida to Georgia. The twelve cartons of film involved contained a total of more than 400 movies. Each movie was in a box which illustrated the activities depicted in the movie. There was no evidence that Grassi ever looked at the contents of the cartons or viewed the movies in them. Grassi's sole defense was that he had no knowledge of the obscene nature of the movies in the shipment and thus was not a knowing participant in the alleged conspiracy.

Before trial, Grassi sought to preclude the government from showing any of the movies to the jury because of their inflammatory nature. He offered to stipulate that the movies were obscene. (R.V2. 7-9).[2] The government refused to accept the stipulation. It contended that the movies were necessary to show Grassi's knowledge of their obscene nature, although there was no evidence that Grassi had ever looked at the movies or even seen the film containers in the cartons. The evidence showed that the films were in Miami when Grassi was in Atlanta and that he was never able to obtain the cartons in Atlanta because they were turned over to the FBI.

The trial court overruled Grassi's objection without viewing any of the films to determine their prejudicial impact. It simply ruled that the government could show the jury two or three "typical" films.

The government showed three films to the jury over Grassi's objection. They contained explicit and graphic homosexual activity which can only be described as disgusting.

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[2]"R" refers to portions of the record on appeal in the Fifth Circuit: "V" refers to the particular volume.

One of the movies showed a man inserting his arms up to his elbows into the rectums of two other persons while those persons masturbated. Another showed a man inserting a banana into the rectum of another person and then eating the banana. They also showed acts of fellatio, analingus and sodomy. The Fifth Circuit aptly described the films as "highly inflammatory material." 602 F.2d at 1196.

On appeal, however, the FifthCircuit rejected Grassi's contention that the trial court should have required the government to accept the stipulation. Without pointing to any probative value of the films, in light of the stipulation of obscenity, the court simply held that the trial judge did not abuse his discretion under Fed.R.Evid. 403.

Another basis for Grassi's appeal in the Fifth Circuit and for this petition was the government's effort to win its case by proving and arguing Grassi's "bad character." During closing argument, the government argued that Grassi had taken money under the table to avoid paying taxes. Grassi's objections were overruled:

> [U.S. Attorney]: Now, isn't it logical, isn't it reasonable, as Mr. Catoe indicated, [Grassi] got a few dollars cash money under the table? For what purpose? So that the IRS would not know about it. When you deal with machine coin money, ladies and gentlemen, cash, you don't always report, reflect documents - -
>
> [Counsel for Grassi]: Judge, I have an objection.
>
> [The Court]: I'm going to overrule your objection. That is based on the evidence.

(R.V5. 610).

The government also attempted to establish other criminal activity which was unrelated to the charges pending against Grassi. One witness testified, over Grassi's objection, that Grassi was in charge of hiring women for massage parlors. (R.V3. 201). The jury was allowed to speculate that Grassi was therefore involved in prostitution or illicit sexual activity. The government referred to this on more than one occasion in closing argument. (R.V5. 55, 612).

The Fifth Circuit apparently agreed with Grassi's contentions concerning the impropriety of the prosecutor's tactics.

> In response to an argument by Grassi's counsel that his pay was low, the prosecutor attempted to assert that Grassi might have another source of income similar to that which the proof showed was made available to another employee by saying that Grassi got "cash money under the table." No proof supported any such payment to Grassi. The argument should not have been made in these terms.

602 F.2d at 1198. But the Fifth Circuit affirmed the conviction despite its finding of error. It did not state why it found the error harmless.

REASONS FOR GRANTING THE WRIT

1. The government's failure to seek judicial scrutiny after obtaining possession of a large volume of films constitutes an invalid prior restraint on first amendment rights.

Grassi adopts and incorporates the arguments presented in the petitions filed by Walter and Sanders. Walter's Petition, Questions Presented No. 3; Sanders' Petition, Questions Presented No. 1. The government cannot seize a large quantity of expressive material without a prior adversary hearing. *Lee Art Theatre v. Virginia,* 392 U.S. 636 (1968); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Marcus v. Search Warrant of Property,* 367 U.S. 717 (1961).

The FBI seized twelve cartons containing hundreds of films. It never sought a warrant. The films were held for over two years until the trial, where a judicial determination was finally made as to the nature of the films. The seizure constituted an illegal prior restraint.

2. There is conflict among the circuits and with decisions of this Court whether the government's acquisition of materials from a third party constitutes a seizure and whether later government screening of the materials is an independent search requiring a warrant.

Grassi adopts and incorporates Walter's and Sanders' position on these points. Walter's Petition, Questions Presented Nos. 1 and 2; Sanders' Petition, Questions Presented Nos. 2-4. Grassi also presents the following

reasons for granting the writ.

The propriety of the government's view of the films two months after seizure is governed by this Court's decisions in *Arkansas v. Sanders,* 99 S.Ct. 2586 (1979); *United States v. Chadwick,* 433 U.S. 1 (1977); *Michigan v. Tyler,* 436 U.S. 499 (1978); and *Mincey v. Arizona,* 437 U.S. 385 (1978). In this line of decisions this Court narrowed the exigent circumstances exception to the fourth amendment warrant requirement. In *Mincey and Tyler,* this Court held that once the exigent circumstances which justify the initial intrusion into a defendant's privacy disappear, law enforcement officers cannot search any further in the absence of a warrant. In *Mincey,* this Court rejected the argument that initial police intrusion into a building justified by an emergency eliminated any right of privacy in the premises and justified a subsequent warrantless search. In *Tyler,* this Court held that a fire inspector's initial search of premises immediately after a fire did not justify a detailed warrantless search of the area by police three days later.

In *Arkansas,* this Court recently reaffirmed the decision in *Chadwick,* relied on by Walter and Sanders in their petitions. It held that the exigent circumstances which justified seizure of the defendant's suitcase did not justify an immediate search of the suitcase's contents where the government had time and probable cause to obtain a warrant.

The government's view of the films two months after taking them from a third person is no different than the subsequent searches conducted by the police in *Mincey* and *Tyler.* In *Mincey* and *Tyler,* the initial intrusions into defendant's privacy were justified by certain narrow excep-

tions to the fourth amendment. Here, the government contends that its seizure of the films was not limited by the fourth amendment because it received them from a third person. Assuming the government properly obtained possession of the film cartons, that does not justify the government's later detailed examination of the contents of the cartons without a warrant.

The fourth amendment limitations on the government's ability to search without a warrant are no different whether one is dealing with premises, a suitcase or cartons of films. If anything, the limitations should be more stringent where the subject of the search is entitled to first amendment protection. It does not matter whether the government properly obtained possession of the material from a third person or by virtue of an exception to the fourth amendment. The analysis of the government's subsequent search of the material is the same. The fact that the government may validly obtain possession of a closed container without a warrant does not justify a subsequent detailed warrantless search of the container's contents.

3. The Fifth Circuit's decision conflicts with this Court's decision in *Pinkus v. United States,* 436 U.S. 293 (1978) by not requiring a jury instruction that children should not be considered in determining community standards.

Grassi adopts and incorporates the argument presented on this issue in Walter's Petition, Questions Presented No. 5 and Sanders' Petition, Questions Presented No. 5. The Fifth Circuit's opinion in this case summarily disposed of Grassi's contentions on this point by citing to its prior opinion in Walter's and Sanders' appeal. *United States v. Sanders,*

592 F.2d 795, 796 (5th Cir. 1979). Determination of their case governs determination of Grassi's case on this issue.

4. The Fifth Circuit's decision conflicts with its prior decision in *United States v. Spletzer,* 535 F.2d 950 (5th Cir. 1976) and with other circuit court decisions and presents an important question whether Fed.R.Evid. 403 allows the government to refuse a reasonable stipulation for the sole purpose of showing highly inflammatory and prejudicial material to the jury in a criminal prosecution.

Grassi's defense was that he did not knowingly participate in a conspiracy to distribute because he had no knowledge of the obscene nature of the films. There was no evidence that he had ever seen the films in the cartons or viewed the films themselves. Grassi offered to stipulate that the movies were obscene to prevent the government from showing the disgusting, inflammatory films to the jury and severely prejudicing the case. Despite the complete absence of evidence that Grassi had ever seen the films, the government contended that the movies were necessary to show Grassi's knowledge of their obscene nature. It refused to accept the stipulation.

The trial court overruled Grassi's objections under Fed.R.Evid. 403 without even looking at the films to make an intelligent determination about their prejudicial effect. It simply relied on the government to select two or three "typical" films to show the jury.

The Fifth Circuit affirmed the trial court's refusal to require the government to accept the stipulation. But it did

not point to any real probative value of the films *in light of the stipulation.* In fact, there was no probative value. Showing the films merely proved that they were obscene, the precise issue to which Grassi offered to stipulate.

In drawing the balance between probity and prejudice, the Court of Appeals ignored the key consideration. The probity of the challenged evidence cannot be considered in a vacuum, but must be considered in light of the proposed stipulation. If the challenged evidence still has some probative value notwithstanding the stipulation, then the stipulation should not be allowed to defeat introduction of the evidence. On the other hand, if the proposed stipulation eliminates all probative value of the challenged evidence, then the stipulation must be accepted. The evidence itself would add nothing of legitimate value to the stipulation. It would only serve to prejudice the defendent.

This is exactly the approach previously adopted by the Fifth Circuit in a prior decision. *United States v. Spletzer,* 535 F.2d 950 (5th Cir. 1976). In *Spletzer,* the defendant was charged with escaping from federal custody. One of the elements of the crime was that the defendant was in custody pursuant to a judgment of conviction. The defendant stipulated that this element was met and not in issue. Nevertheless, the government introduced the defendant's prior conviction for bank robbery. The Fifth Circuit reversed. The evidence was not probative of any real issue in the case and the government had no real need for it.

> [W]here the probative value of relevant evidence is substantially outweighed by its potential for unfair prejudice, it should be excluded: . . . An important consideration relating to probative value is the prosecutorial need for such evidence . . . . In this case there was no prosecutorial need for the judgment of conviction in light of Spletzer's sworn admission of the conviction and confinement elements . . . [W]hat ever slight cumulative probative value can be ascribed to the judgment of conviction of bank robbery was substantially outweighed by its danger of creating prejudice.

535 F.2d at 955-56.

Circuit court decisions before the adoption of Rule 403 contained virtually no analysis of whether the government could refuse a reasonable stipulation and insist on showing highly inflammatory material to the jury. *See, e.g., United States v. Mishkin,* 317 F.2d 634 (2nd Cir. 1963); *Alire v. United States,* 313 F.2d 31 (10th Cir. 1963). Decisions after the adoption of the rule have generally analyzed the issue by viewing the probative value of the evidence in light of the stipulation. *See, e.g., United States v. Peltier,* 585 F.2d 314, 324-25 (8th Cir. 1978); *United States v. Cockerham,* 476 F.2d 542, 545 (D.C. Cir. 1973). These decisions found no abuse of discretion in refusing stipulations because the evidence which the government sought to introduce had value in proving material matters which would *not* be concluded by the stipulation.

Here, the Fifth Circuit found that the movies were "highly inflammatory." 602 F.2d at 1196. But the court pointed to no prosecutorial need for the evidence in light of the stipulation. The movies proved nothing other than their obscenity. They served no prosecutorial need other than to inflame the jury.

The Fifth Circuit's failure to analyze the probative value of the films in light of the stipulation conflicts with its prior decision in *Spletzer* and with the analysis used in other circuits. This Court should review the Fifth Circuit's nebulous interpretation of Rule 403, which allowed the government to show highly inflammatory movies to the jury for no legitimate evidentiary purpose.

5. The Fifth Circuit's decision conflicts with numerous circuit court decisions which hold that a prosecutor may not present argument which is not based on evidence in the record.

The prosecutor argued to the jury in closing that Grassi had taken money "under the table" for the purpose of avoiding income taxes. This argument was not supported by any evidence in the record and was immaterial to any issue in the case. Although it recognized that the argument was improper, the Fifth Circuit affirmed the conviction without discussing why the error might be harmless.

The Fifth Circuit's decision specifically conflicts with two of its prior decisions and conflicts generally with other circuit court decisions. *United States v. Miranda,* 593 F.2d 590 (5th Cir. 1979); *United States v. Corona,* 551 F.2d 1386 (5th Cir. 1977); *United States v. Martinez,* 514 F.2d 334, 343 (9th Cir. 1975); *United States v. Goodwin,* 492 F.2d 1141 (5th Cir. 1974); *Hall v. United States,* 419 F.2d 582 (5th Cir. 1969). *And see South v. United States,* 368 F.2d 202 (5th Cir. 1966) (error to admit income tax returns into evidence allowing inference that defendant was an income tax evader where such material was irrelevant to the crime charged.)

In *Goodwin, supra,* the prosecutor referred to the defendant as a "fugitive." There was no such evidence in the record. The Fifth Circuit reversed.

The same conclusion was reached in *Hall, supra.* There the prosecutor referred to the defendant as a "hoodlum." The court held

> This type of shorthand characterization of an accused, not based on the evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises - - succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.

419 F.2d at 587.

Quite simply, the prosecutor's conduct in this case violates the teaching of this Court in *Berger v. United States,* 295 U.S. 78 (1935). The trial court improperly admitted evidence that Grassi hired women for massage parlors. The prosecutor referred to that evidence and argued alleged income tax evasion without any evidence. This misconduct by the government, after its refusal to accept a reasonable stipulation to show highly inflammatory films, cannot be condoned. The Fifth Circuit, like the jury, was prejudiced by the improper manner in which this case was prosecuted. It departed from its own prior case law and, without any explanation, reached a conflicting conclusion.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the Fifth Circuit.

Respectfully submitted,

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November 21, 1979

APPENDIX

UNITED STATES of America
Plaintiff-Appellee,

v.

Michael John GRASSI, Jr.
Defendant-Appellant.

No. 78-5494.

United States Court of Appeals
Fifth Circuit.

Sept. 19, 1979.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, CLARK and FAY, Circuit Judges.

CHARLES CLARK, Circuit Judge.

An eleven-count indictment charged Michael John Grassi, Jr., and three other persons with violating various statutes forbidding the interstate transportation of obscene materials.[1] Grasi was tried separately from his co-defendants and was convicted on all counts. The salient features of the plan to distribute obscene materials and the government's

[1]Count one of the indictment charged Grassi with conspiracy to transport obscene materials in interstate commerce in violation of 18 U.S.C. §371. Counts two, four, six, eight, and ten alleged that Grassi

investigation of it are detailed in a prior decision of this court involving the appeals of other participants in the scheme, *United States v. Sanders,* 592 F.2d, 788, 790-91 (5th Cir. 1979). In this appeal, Grassi urges that the district court erred in permitting the jury to view the obscene films which were the subject of the indictment and in admitting various other pieces of evidence, that a statement made in the prosecutor's closing argument was an impermissible comment on Grassi's failure to testify, that the evidence was insufficient to convict him, and that the district judge's instructions to the jury were defective. Concluding that no reversible error occurred, we affirm.

The indictment against Grassi was based on the distribution of five obscene films. During the course of Grassi's trial, the government asked the court for permission to show these five films to the jury. Objecting to the admission of the films on grounds that their obscene contents would prejudice the jury against Grassi, the defense attorney offered to stipulate that the films were obscene. After the prosecutor had refused to accept the proposed stipulation, the district court partially overruled the defendant's objection and allowed the jury to view three of the films. These films, which require between ten and eleven minutes to show, portray homosexual acts of the most bizarre and repulsive nature. They are also largely repetitious.

Grassi urges that, under Rule 403 of the Federal Rules

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had violated 18 U.S.C. § §2 and 1465 by aiding and abetting others to transport obscene materials in interstate commerce. Counts three, five, seven, nine and eleven charged Grassi with aiding and abetting others to use a common carrier engaged in interstate commerce to transport obscene materials in violation of 18 U.S.C. § §2 and 1465.

of Evidence,[2] the films should have been excluded since their probative value, in light of the proffered stipulation, was substantially outweighed by the prejudice arising from them. He argues, in the alternative, that the judge should have permitted the jury to view only a portion of one of the films. The government asserts that it had a right to refuse the stipulation and to show the films since they were necessary to prove the obscenity element of the crime with which Grassi was charged and to show that Grassi was aware of the contents of the films. Asserting that a decision concerning the obscenity of the films could not be made by viewing excerpts from them, the government also contends that the district court did not err in allowing the prosecution to present the three films in their entirety.

The process of evaluating the probity and prejudice inherent in a particular piece of evidence can be a complex one calling for a sifting of many disparate factors. Among the central considerations in determining probative value are, first,"how strong a tendency" the proffered evidence has to prove an issue of consequence in the litigation, 22 C. Wright & K. Graham, Federal Practice and Procedure § 5214 at 271 (1978); *see United States v. Beechum,* 582 F.2d 898, 914-915 (5th Cir. 1978) (en banc), and, second, the proponent's need for the evidence, *United States v. Spletzer,* 535 F.2d 950, 956 (5th Cir. 1976); Wright, *supra,* at 268-70. Since the films are admittedly the strongest available proof on the obscenity element of the crime, only the second probity consideration is at issue here.

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[2]Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

But for the defendant's offer to stipulate, our task in reviewing the district judge's determination under Rule 403 would be an easy one. The government was required to prove that all the films which were the subject of the indictment were obscene. A work is obscene if "the average person, applying contemporary community standards would find that the work as a whole appeals to the prurient interest," if "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and if "the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). Under the *Miller* standard, a jury is required to view a film in its entirety in order to determine whether the film is obscene. *United States v. Levine,* 546 F.2d 658, 668 (5th Cir. 1977). Thus, in the absence of the stipulation, the probative value of the films here is as high as it could possibly be; any conclusion that the films were inadmissible because of prejudice would mean that the obscenity element could not be proven and that the defendant could not be tried. Whatever prejudice would arise from admission of the films in this situation could not substantially outweigh the probative value of the films. *See* Wright, *supra,* § 5213 at 266.[3]

[3] The government also urges that even if the three films should not have all been admitted on the obscenity issue, they were admissible to show Grassi's knowledge of the obscenity of the films and to show the extent of Grassi's participation in the scheme to distribute them. In order to prove a person has knowingly transported obscene materials, it need not be shown that the defendant was aware that the materials are legally obscene; the knowledge element is satisfied by proof that the defendant knew "of the materials' sexual orientation." *United States v. Thevis,* 490 F.2d 76, 77 (5th Cir. 1974). Here, the government proved that the films were distributed in boxes, the outside covers of which contained a graphic description of the contents of the films, and that Grassi had viewed the boxes. In light of this evidence, the additional probative

However, the defendant offered to stipulate that all of the films were obscene. Thus, the central issue in this case is how that offer to stipulate affects the probative value of the films. We examined the effect of an offer to stipulate on the Rule 403 balancing process in *United States v. Spletzer,* 535 F.2d 950, 956 (5th Cir. 1976). At his trial, Spletzer, who was charged with escaping from a federal prison, offered to admit the fact that at the time of his escape he had been confined in a federal prison pursuant to a judgment of conviction. Despite this tender, the district court permitted the government to introduce a certified copy of Spletzer's prior bank robbery conviction. This court held that the proposed stipulation eliminated the prosecutorial need for the copy of the judgment and that the district court abused its discretion in admitting the copy. The court also noted that the prejudice resulting from the introduction of the prior conviction could have been substantially reduced by deleting the language revealing the nature of the prior offense. *Id.* at 956, n.8.

Although *Spletzer* holds that an offer to stipulate should be among the factors considered in making a decision to admit or exclude the evidence under Rule 403, it does not indicate what result should be reached with regard to the films at issue here. The *Spletzer* court noted that the prosecution could, by introducing the expurgated conviction, still have proven the elements of the crime even if it chose not to accept any part of the defendant's stipulation. Here, the prosecution must show all five films to the jury in order to meet its burden of proof on the obscenity issue. Thus, if the Rule 403 balancing process, taking into account the stipula-

value, if any, of showing three of the films to prove knowledge and participation was slight.

tion, requires the exclusion of any of the five films, then the prosecution must either accept a stipulation regarding the obscenity of the excluded films or face dismissal of that portion of the charges.

In *Parr v. United States,* 255 F.2d 86, 88 *cert. denied,* 358 U.S. 824, 79 S.Ct. 40, 3 L.Ed.2d 64 (1958), we held that, as a general rule, a party may not preclude his adversary's proof by an admission or offer to stipulate. *See United States v. Caldwell,* 117 U.S. App.D.C. 20, 46, 543 F.2d 1333, 1359, n.4 (1974); *United States v. Cockerham,* 155 U.S.App.D.C. 97, 476 F.2d 542 (1973); *United States v. Brickey,* 426 F.2d 680. 686 (8th Cir.), *cert. denied,* 400 U.S. 828, 91 S.Ct. 55, 27 L.Ed.2d 57 (1970); *United States v. Mishkin,* 317 F.2d 634, *cert. denied,* 375 U.S. 827, 84 S.Ct. 71, 11 L.Ed.2d 60 (1973); *Alire v. United States,* 313 F.2d 31, 34-35 (10th Cir. 1962), *cert. denied,* 373 U.S. 943, 83 S.Ct. 1554, 10 L.Ed.2d 699 (1963). At Parr's trial for the distribution of obscene films, some of the films were shown to the jury over Parr's objection and offer to stipulate that the films were obscene. Upon Parr's appeal, this court affirmed on the ground that it was permissible for the government to present proof on the obscenity issue notwithstanding the stipulation since obscenity was an essential element of the crime with which Parr was charged. *Parr, supra,* at 88.

The government contends that *Parr* holds that the probative value of a piece of evidence necessary to prove an element of the crime can never be substantially outweighed by the unfair prejudice arising from it even if the defendant offers to stipulate to the matter. Acceptance of this argument would mean that Rule 403 could never be used to require the

government to accept a defendant's stipulation regarding an element of the crime. We decline to adopt this reading of *Parr,* which was decided before Rule 403 was adopted. The government's contentions are inconsistent with the holding in *Spletzer* that an offer to stipulate should be given weight in the Rule 403 balancing process. In addition, both *Spletzer,* 535 F.2d at 955, and *Parr,* 255 F.2d at 98, recognized that the rule against requiring a party to accept an opponent's stipulation is a general rule and proceeded to examine whether the rule should have been applied in particular fact situations. This implies that the *Parr* rule is not a blanket prohibition against compelling the government to accept a defendant's stipulations. *See United States v. Brinklow,* 560 F.2d 1003, 1006 (10th Cir. 1977), *cert. denied,* 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 789 (1978); Wright, *supra* § 5194 at 198-199.

Moreover, acceptance of the government's arguments could cause ludicrous results in specific cases. In this case, for example, the shipment that was the subject of the indictment contained 871 separate reels of film. *Sanders, supra,* 592 F.2d at 790, n.2. If the government had chosen to indict Grassi on a separate count for each individual film, then the government would have been required to show each of the 871 films at the trial in order to establish their obscenity. Adopting the government's reading of *Parr* would allow the prosecution to exhibit this massive amount of highly inflammatory material even if the defendant offered to stipulate to its obscenity. This result would directly contravene the policies underlying Rule 403. Thus, we hold that *Parr* does not entirely preclude the requirement that an offer

to stipulate must form a part of the Rule 403 weighing of probity and prejudice.[4]

It could also be argued that the offer of a stipulation, as a matter of law, totally eviscerates the probative value of a piece of evidence relevant to the matter stipulated and thus mandates exclusion of that evidence under Rule 403. The effect of adopting this opposite extreme in construing the Rule would be to require a party to accept any stipulation offered by his opponent and thus would allow a party to control the proof presented by his opponent at trial. We also reject this construction of Rule 403. A piece of evidence can have probative value even in the event of an offer to stipulate to the issue on which the evidence is offered. A cold stipulation can deprive a party "of the legitimate moral force of his evidence." 9 Wigmore on Evidence § 2591 at 589 (3rd ed. 1940), and can never fully substitute for tangible, physical evidence or the testimony of witnesses. In most cases, a party has the right "to present to the jury a picture of the events relied upon." *Parr, supra,* 255 F.2d at 88.

Rule 403 also requires a trial court to determine the amount of unfair prejudice resulting from the introduction of a piece of evidence. The phase "unfair prejudice" does not refer alone to the fact that a particular piece of evidence will

[4] The Advisory Committee's Notes on the Proposed Federal Rules of Evidence imply that the Rule 403 weighing process can, in some situations, result in requiring a party to accept his opponent's stipulations. The note concerning Rule 401 states that evidence can be relevant even if offered on undisputed matters, but proceeds to conclude that *"[w]hile situations will arise which call for the exclusion of evidence offered to prove a point conceded by an opponent,* the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403) . . . ." 28 U.S.C.A. Rule 401 at 85 (emphasis added).

have adverse effects on a party's case. Most evidence offered by an opponent should have this effect. *Dollar v. Long Manufacturing, N.C., Inc.,* 561 F.2d 613, 618 (5th Cir. 1977), *cert. denied,* 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978). Rather " 'unfair prejudice' within this context means an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." Notes of the Advisory Committee on Proposed Federal Rules of Evidence, 28 U.S.C.A. Rule 403 at 102; *see* Wright, *supra* § 5215. Thus, it is not enough for a party who asserts that Rule 403 requires an opponent to accept a stipulation merely to show that the evidence that is the subject of the stipulation is detrimental to his case.

In formulating a rule for the application of Rule 403 in instances in which a stipulation is offered, we reject any per se approach. *See* Notes of Advisory Committee on Proposed Federal Rules of Evidence, 28 U.S.C.A. Rule 404 at 109. Rather, as is the case with other applications of Rule 403, determining the weight to be given an offer to stipulate in the balancing process is committed to the sound discretion of the trial court, tempered by the particular facts presented. *See United States v. Jackson,* 576 F.2d 46, 49 (5th Cir. 1978); *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1347 (5th Cir. 1978). This discretion should be exercised to so balance probity against prejudice that the trial is fundamentally fair. In achieving this balance, the court has the power to require the government to accept a tendered stipulation in whole or in part as well as to permit it to reject the offer to stipulate in its entirety.

In this case the district court allowed the prosecution to show three of the films to the jury despite the defendant's offer to stipulate to the obscenity of all of the films. The

less prejudicial alternative was to show fewer films and require the stipulation to be accepted as to the rest. However, in the context of this case, we cannot fault the trial judge for not requiring it. With the initial showing, the shock value was largely, if not entirely, spent. The films were repetitious to the point of boredom rather than revulsion. Given the probative value of these films which, even in light of the offer to stipulate, was substantial, we cannot hold that showing three films mandates a finding that the district court abused its discretion in allowing three films to be shown instead of two or one.

Grassi objects to various other evidentiary rulings made by the trial court, including the admission of testimony which referred to the existence of certain sexual paraphernalia in the warehouse where Grassi worked and the failure to exclude testimony which mentioned a local pornography "kingpin" and the hiring of girls to work in a "bath house." Again, the admission or exclusion of such testimony depends upon the result of the Rule 403 balancing process, which calls for an assessment of the probative value of the testimony in light of all the other evidence adduced at that trial. All of these rulings involve the sort of close calls which district judges must make in the course of trying law suits. Every tender involved matters which were relevant to some essential element of the government's case. None is so plainly wrong as to constitute the unfair prejudice which would make it an abuse of discretion.

Grassi's challenge to the sufficiency of the evidence is meritless. He contends that the proof failed to show he was a knowing participant in the conspiracy charged. However, his role as a "roadman" or manager was well established. It was Grassi who called about this particular shipment when it fell

into the wrong hands. The boxes containing each of the subject 871 films display a suggestive photograph and printed summary of the activity involved. In view of the explicit nature of these descriptions, Grassi would have had to be both illiterate and blind not to know he was trafficking in pornography. The repetitious nature of the three films viewed and the packing of all, would enable reasonable jurors to conclude that all five films were in fact obscene. Indeed defendant continues to insist they were. Although the trial judge should have required the stipulation to be accepted as to the films not shown, the failure to do so in this case affects no substantial right of the defendant and is patently harmless error. Fed.R.Crim.P. 52(a).

Grassi also alleges that the prosecutor's closing argument was improper because the prosecutor said,

> I don't want you to think this is a trial to defeat any person's Fifth Amendment - not Fifth Amendment but any person's First Amendment.

This remark is asserted to constitute a comment on Grassi's failure to testify. Not so. Obviously, it was only a harmless slip-of-the-tongue by the prosecutor, which was immediately corrected and is harmless.

In response to an argument by Grassi's counsel that his pay was low, the prosecutor attempted to assert that Grassi might have another source of income similar to that which the proof showed was made available to another employee by saying that Grassi got "cash money under the table." No proof supported any such payment to Grassi. The argument should not have been made in these terms. The prosecutor

also argued Grassi was connected with hiring girls for "bath houses" and massage parlor operations. Grassi said this permitted the inference he had committed other crimes. These comments did find support in the evidence. This type of hard but not foul blow is not error.

Grassi also challenges the district judge's instructions concerning the obscenity element of the crime, contending that the judge erred in failing to exclude children from the community standard portion of the instruction. We rejected this argument in *Sanders,* 592 F.2d at 795-796.

The conviction of Michael John Grassi, Jr., is

AFFIRMED.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
October 24, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5494 -
U.S.A. *v.* MICHAEL JOHN GRASSI, JR.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By/s/Sally Hayward
Deputy Clerk

cc:
Mr. Marc Cooper
Mr. Anthony J. LaSpada

UNITED STATES of America
Plaintiff-Appellee,

v.

Arthur Randall SANDERS, Jr.,
Gulf Coast News Agency, Inc.,
Trans World America, Inc., a/k/a TWA, Inc.,
and William Walter,
Defendants-Apellants

No. 77-5715.

United States Court of Appeals,
Fifth Circuit.

April 2, 1979.

Rehearing and Rehearing En Banc
Denied June 15, 1979.

Glenn Zell, Atlanta, Ga., for Sanders, Gulf, TWA.

W. Michael Mayock, Los Angeles, Cal., for Walter.

John L. Briggs, U.S. Atty., Jacksonville, Fla., Donald B. Nicholson, Philip Wilens, Chief, Dept. of Justice, Govt. Regulations & Labor Sec., Crim Div., Washington D. C., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

AINSWORTH, Circuit Judge:

Arthur Sanders, William Walter, Gulf Coast News Agency, Inc. ("Gulf Coast News") and Trans World America, Inc. ("TWA") appeal their convictions under 18 U.S.C. § 371 for conspiring knowingly to use a common carrier to ship obscene materials interstate, in violation of 18 U.S.C. § 1462, and knowingly to transport obscene matter interstate for the purpose of sale or distribution, in violation of 18 U.S.C. § 1465. Sanders, Walter and Gulf Coast News also challenge their convictions for substantive violations of sections 1462 and 1461.[1] Appellants all allege an unconstitutional search and seizure and attack the district court's

[1]Under 18 U.S.C. § 371.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

18 U.S.C. § 1462 provides in pertinent part that

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce-

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture motion picture film, paper, letter, writing, print, or other matter of indecent character, **or** . . .

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful-

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1465 provides that

jury instructions on obscenity; appellant Walter further contends that he "was not shown to possess the requisite scienter." We find these assertions to be without merit and therefore affirm the convictions.

1. Facts.

According to the testimony at trial, on September 15, 1975, Richard Larson, the manager of appellant Gulf Coast News, located in St. Petersburg, Florida, ordered an employee to deliver 12 cartons, containing a series of 8 mm. films entitled "David's Boys,"[2] to Greyhound Bus Package Express in St. Petersburg for shipment to Atlanta. The packages had a nonexistent return address and named a fictitious corporation, "D and L Distributors," as shipper. Described as containing printed matter, they were sent on a

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Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publication or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

[2]The series "David's Boys" included 25 individual titles. The 12 cartons contained 871 reels of film.

"will call" basis to "Leggs, Inc.," another fictitious company. "Legs" was the nickname of a female employee at appellant TWA's Atlanta headquarters. When the cartons reached Atlanta, Greyhound forwarded them to a branch station located near L'Eggs Products, Inc. ("L'Eggs"), a manufacturer of women's hosiery and regular customer of Greyhound Package Express. After Greyhound informed L'Eggs of the shipment, Michael Horton, a L'Eggs Products employee, came to the terminal, opened one of the cartons and discovered that it contained sexually explicit movies. Horton returned to the L'Eggs office and described the package's contents to a superior, William Fox. Concerned that his company might be implicated in the transportation of pornographic films, Fox drove to the Greyhound station and brought the 12 cartons to the L'Eggs office. He and several other employees opened all the packages and found individual boxes of film. The top of each film box showed the name "David's Boys" and a drawing of two nude males embracing and kissing; on the back of each were the title of the individual movie and a detailed description, in explicit terms, of the bizarre homesexual acts depicted in the film. Fox then telephoned the FBI, explained the nature of the films and asked "them to come out and take the materials away." The FBI procured the films on October 1, 1975, and subsequently viewed them on a projector at its offices. No warrant was obtained.

Appellants Walter and Sanders, who jointly operated appellants TWA and Gulf Coast News, were indicted along with both corporations under 18 U.S.C. § 371 on one count of conspiring knowingly to use a common carrier to ship obscene materials interstate, in violation of 18 U.S.C. § 1462, and knowingly to transport obscene matter interstate for the purpose of sale and distribution, in violation of 18

U.S.C. § 1465. Gulf Coast News, Walter and Sanders were also charged with five counts of substantive violations of section 1462 and five substantive violations of section 1465.[3] The jury convicted TWA of conspiracy and returned guilty verdicts as to Walter, Sanders and Gulf Coast News on all eleven counts. The district court fined TWA $10,000, Gulf Coast News $33,000 and sentenced both Walter and Sanders to three years in prison on each count, to run concurrently.

II. The Constitutionality of the Search and Seizure

Appellants first urge that the district court committed reversible error in failing to suppress the five films admitted in evidence at trial. Since appellants TWA and Gulf made no pretrial motion to suppress, they cannot raise this issue on appeal. *United States v. Bush,* 5 Cir., 1978, 582 F.2d 1016, 1018. Though appellants Sanders and Walter each made a timely motion to suppress and return the films, the district court sought to determine at the outset whether they had standing to challenge the constitutionality of the search and seizure. To establish such standing under traditional Fourth Amendment analysis, a defendant must either show presence on the searched premises at the time of search, allege a proprietary or possessory interest in the premises or objects searched or be charged with an offense that includes as an essential element possession of the seized evidence at the time of the contested search and seizure. *See Brown v.*

[3]The five counts under section 1462 and the five section 1465 counts enumerated the same five movies from the "David Boys" series: "Look at the Birdie," "The Clean Up," "Black Rape,", "The Massage," and "Loving Hands."

United States, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973); *United States v. Hunt,* 5 Cir., 1974, 505 F.2d 931, 939-40. "Generally a defendant satisfies the standing requirement if he has an adequate possessory interest in the place or object searched to give rise to a reasonable expectation of privacy." *United States v. Hunt, supra,* 505 F.2d at 938.

In denying appellants' suppression motion, the district judge held that "shipping or causing or suffering to be shipped by a common carrier . . . with a fictitious name given for the shipper as well as the fictitious name given for the consignee or addressee, amounts to a relinquishment or abandonment of any reasonable expectation of privacy. Or, stated another way, it seems to me that it was reasonably foreseeable that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be misdelivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded." There is merit in the district court's conclusion. However, the Supreme Court has recently "dispensed[ed] with the rubric of standing. . . by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine," *Rakas v. Illinois.* _____ U.S. _____, 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978) so we will focus "on the extent of a particular defendant's rights under the Fourth Amendment rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.,* _____ U.S. at _____, 99 S.Ct. at 428.

A. The Search by L'Eggs Products Employees.

Appellants Sanders and Walter argue that the L'Eggs

Products employees, in opening the 12 cartons and examining their contents without a warrant, conducted an unconstitutional search. The Fourth Amendment's warrant requirement, of course, is intended solely "as a restraint upon the activities of sovereign authority." *Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed.2d 1048 (1921), and "a search . . . conducted by a private individual for purely private reasons, . . . does not fall within the protective ambit of the Fourth Amendment." *United States v. Lamar,* 5 Cir. 1977, 545 F.2d 488, 489-90; *United States v. Jones,* 5 Cir., 1972, 457 F.2d 697, 699; *Barnes v. United States,* 5 Cir., 1967, 373 F.2d 517, 518. However, if under the circumstances of the case the private party "acted as an 'instrument' or 'agent' of the government," the ostensibly "private" search must meet the amendment's standards. *United States v. Bomengo,* 5 Cir., 1978, 580 F.2d 173, 175. *See Lustig v. United States,* 388 U.S. 74, 79, 69 S.Ct. 1372, 1374, 93 L.Ed.2d 1819 (1949). Before the L'Eggs Products employees ever contacted the FBI, they had on their own initiative taken the shipment of films from the bus terminal, opened the cartons, examined individual film boxes and ascertained the nature of the films. Since "there is no indication in the record" that in so doing the L'Eggs employees "acted at the behest or suggestion, with the aid, advice or encouragement, or under the direction or influence of the F.B.I.," we conclude that these activities constituted a private search, beyond the scope of the Fourth Amendment. *United States v. Clegg,* 5 Cir., 1975, 509 F.2d 605, 609.

B. FBI Acceptance of the Films

Nevertheless, Sanders and Walter contend that the FBI unconstitutionally seized the films, by accepting them from

the L'Eggs employees without obtaining a warrant. In making this assertion, they rely principally on the Eighth Circuit's decision in *United States v. Kelly,* 1976, 529 F.2d 1365. There, an employee of a common carrier discovered that a ripped-open carton of goods contained sexually explicit books and magazines and called the FBI, which sent an agent who examined several of the magazines and retained samples, without obtaining a warrant. Although the *Kelly* court said that the common carrier's search was private, it held that the Government's subsequent acceptance of the fruits constituted a seizure requiring a warrant, "unless there are special circumstances which excuse compliance with the . . . warrant requirement," decided that no exception to that requirement applied and concluded that the warrantless "seizure" was "so unreasonable as to necessitate the operation of the exclusionary rule." *Id.* at 1371.

The result in *Kelly* conflicts with the reasoning implicit in a long line of private search decisions by the Supreme Court and this circuit. In every such case, introducing the fruits of a private search as evidence was impossible unless the private party had at some point surrendered the articles to the Government. Yet neither we nor the Supreme Court have ever held that government acceptance of those articles constitutes a seizure requiring compliance with the warrant requirement, even in cases where no exception to that requirement would have covered the Government's action. *See, e.g., Burdeau v. McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed.2d 1048 (1921); *United States v. Lamar,* 5 Cir., 1977, 545 F.2d 488; *United States v. Blanton,* 5 Cir., 1973, 479 F.2d 327; *Barnes v. United States,* 5 Cir., 1967, 373 F.2d 517. Thus, we decline to accept the *Kelly* court's analysis.

In *United States v. Sherwin,* 9 Cir., 1976, 539 F.2d 1, the Ninth Circuit, sitting en banc, also rejected the *Kelly* rationale. *Sherwin* also involved a common carrier employee who examined the contents of damaged packages, discovered sexually explicit books and called the FBI, which sent agents who removed two books from the shipment, without a warrant. Citing *Kelly,* the *Sherwin* defendants argued on appeal that "a seizure to which the fourth amendment is applicable occurred . . . when the F.B.I. agents obtained the two books" from the common carrier, *id.* at 7, but the Ninth Circuit did "not regard the government's acceptance of materials obtained in a private search to be a seizure" and concluded that "the fourth amendment [is] not implicated when articles discovered in a private search [are] voluntarily turned over to the government." *Id.* We agree with the Ninth Circuit's reasoning. Under the circumstances, we hold that the FBI's acceptance of the "David's Boys" films from the L'Eggs employees was not a seizure within the meaning of the Fourth Amendment.

C. Viewing of the Films

Appellants Sanders and Walter further assert, basing their argument on another Eighth Circuit case, *United States v. Haes,* 1977, 551 F.2d 767, that the Government conducted an additional unconstitutional search by viewing the films on a movie projector without obtaining a warrant. In *Haes,* the employee of a common carrier, seeking to identify the consignee of a shipment, opened a package, discovered sexually explicit films and contacted the FBI, which sent two agents with a movie projector to the common carrier's office, where the films were screened without first obtaining a warrant. Declaring that "the inquiry must be

whether the government" thereby undertook "any new or different searches," the Eighth Circuit said that the Government's viewing of the films "changed the nature of the search," because the private search had involved no such screening, and held that the search was illegal, since no exception to the warrant requirement applied. *Id.* at 773-74.

Unlike *Haes,* however, where the private party "had not viewed the films and had not attempted to make a decision as to whether or not they were obscene," *id.* at 771, the L'Eggs employees were able to make "a determination of possible obscenity prior to turning the films over to the FBI,"[4] *id.* at 772, by examining the individual boxes

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[4]In announcing its holding on this issue, the *Haes* majority emphasized the factual circumstances and noted that "[w]e would feel otherwise if the private search had included any sort of viewing of the films and a determination of possible obscenity prior to turning the films over to the F.B.I." 551 F.2d at 771-72. Under the factual circumstances here, however, the L'Eggs employees did not need actually to screen the films to make that determination. The Eighth Circuit stressed that *Haes* "was not the case" where "the private employee had tangible evidence upon which to believe that the material was being illegally transported in interstate commerce," *id.* at 772, n.1, but here, in contrast, the individual film boxes amply supported the belief of the L'Eggs employees that such illegal transporation had occurred.

[5]The indictment listed five of the 25 "David's Boys" titles included in the shipment. The individual boxes containing "Look at the Birdie" said that:

> Corbett really gets turned on when Rich comes over for a photo session. In the a--close-ups you won't believe! The highlight of the movie happens when Corbett masturbates and ---- on Rich's face! This is a flick you will not forget.
>
> "The Clean Up (3 white)" boxes read that
>
> Lenny and Eric turn each other on and when you see these good

containing the films. In this case, the legend "David's Boys" and a cartoon of two nude males kissing and embracing appeared on one side of each film box; the other side carried the title of the individual film and a detailed description, in language of the utmost explicitness, of the bizarre homosexual acts depicted in the movie.[5] Under these circumstances, since the L'Eggs employees so fully ascertained the nature of the films before contacting the authorities, we find that the FBI's subsequent viewing of the movies on a projector did not "change the nature of the search" and was not an additional search subject to the warrant requirement.[6] We have held that

looking studs you'll know why!!! The action gets heavy and then Les enters the picture. - galore and Les cleans it up like you've never seen. Great close-ups!

The "Black Rape" (1 blk. 1 wht.) boxes stated that

Big Black Lance has an 11" ---- but it doesn't take long before the small slender Larry is taking it all right up the - - -! Good tongue action and a surprise that you won't believe. You will love the close-up action.

The boxes containing "The Massage" explained that

Angelo the masseur gets turned on as he gives Tommy a rubdown. Angelo's expert tongue & hands soon have Tommy's --- hard & excited. But he wants it the Greek way and Angie complies.Then he --- beautiful on Tommy's face! This is one of the best close-ups of french love you will ever see!

Finally, the "Loving Hands" boxes said that

Murray and Carl are well into their love sessions when Ben enters the room. He will show you his loving hands as he shoves them with his arms -- (just short of his elbows!) right up his friends' a-- h---!! While they masturbate! It is a true masterpiece for the avid connoisseur!!

(Certain particularly salacious words have been deleted by the writer of this opinion, as indicated.)

[6]We note as well the question posed by then Judge Webster in his *Haes* dissent:

> Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier employee could not reasonably open the publication and peruse its pages to determine whether its contents

the reopening and reinspection of a bag by government authorities following a private search does not constitute a separate, independent search requiring a warrant. *United States v. McDaniel,* 5 Cir., 1978, 575 F.2d 1224, 1226-27 *United States v. Blanton,* 5 Cir., 1973, 479 F.2d 327, 328. These decisions support our conclusion on this issue, for in our view, "much less than reopening and reinspection of the box and its contents was the activity of the FBI" here.[7] *United States v. Pryba,* 1974, 163. U.S. App.D.C. 389, 399, 502 F.2d 391, 408.[8] *See also United States v. Ford,* 10 Cir.,

offended the law? Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search independent of the lawful private search which produced the object? I think clearly not.

The film in this case was not a means of concealing something else. In looking at the film through a projector, the agents did no more than view the motion pictures in the manner in which they were intended to be viewed. 551 F.2d at 772-73.

[7]The Supreme Court's decision in *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) does not affect the outcome of this case. In *Chadwick,* the federal agents gained exclusive custody of property still to be searched, whereas here, the FBI took control of property that had already been searched by a private party and did not conduct any additional search of its own requiring a warrant. *See also United States v. Johnson,* 5 Cir. 1979, 588 F.2d 147.

[8]In *Pryba,* a nervous shipper, reluctant to disclose the contents of a box, aroused the suspicions of an air freight clerk in San Francisco. The clerk's supervisor opened the box and found "unpackaged reels of 8-millimeter color movie film bearing titles unsubtly suggesting sex." The supervisor held two films up to the light and saw both hetero- and homosexual nude couples, "engaging in sexual acts." He called the FBI, which sent an agent with a movie projector to the freight carrier's office. After watching two more movies, with the FBI agent still present, the supervisor repackaged the films and replaced the boxes in transit to Washington. 163 U.S.App.D.C. at 393, 503 F.2d at 395. Judge Spottswood Robinson first concluded that the activities of the clerk and

1975, 525 F.2d 1308, 1312.[9]

III. Walter's Scienter

Appellant Walter contends that there was insufficient evidence to sustain his conviction, because the Government failed to establish a "close nexus" between him and "a specific shipment of proved obscene matter" and because there was no evidence as to scienter. This assertion is

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his employer before the FBI brought the movie projector constituted a private search and then declared that "we are unable to perceive in the subsequent events any new or different search after the F.B.I. agent arrived. There is respectable authority holding that not even a reopening and reinspection of a package by federal officers, after the initial opening and inspection by airline personnel entirely on their own, constitutes a separate or additional search subject to Fourth Amendment requirements. We need not venture nearly so far, for much less than reopening and reinspection of the box and its contents was the activity of the FBI in the instant case." *Id.*, 163 U.S.App.D.C. at 399, at 401.

[9]In *Ford,* as in *Pryba,* a nervous shipper, at first unwilling to identify the contents of a package, led an air freight supervisor to unwrap the box. He discovered "about eight prophylactics, six or seven inches long, containing a powdered substance," and called the local police. When the officers arrived, they conducted an "on-the-spot field test" which "showed that the substance was heroin." 525 F.2d at 1308. Rejecting the assertion that the agents thereby conducted an illegal, warrantless search, the Tenth Circuit said that the "government agents appeared only after the suspicion of the possible presence of contraband was confirmed by discovery of the prophylactics. At this point, it was the province and indeed the duty of the officers to further investigate the open box, which they did without any invasion of protected rights of privacy, to determine whether the suspicious substance in plain view as in fact contraband . . . government agents arrived." *Id.* at 1312. Similarly, the FBI agents here, in viewing the films on a projector, were attempting to confirm or dispel the suspicion, first developed by the L'Eggs employees, that the films had been transported illegally.

meritless, as there was ample evidence to support the jury's finding that Walter knowingly used a common carrier to ship obscene materials interstate, knowingly transported obscene matter interstate for the purpose of sale or distribution and knew the obscene nature of the films shipped interstate.

According to the testimony at trial, Walter and Sanders jointly operated an extensive network of adult cinemas, bookstores and distribution warehouses, which included appellants TWA and Gulf Coast News. Ernest Golden, who had served as accountant and bookkeeper for these various enterprises, testified that he received instructions from both Walter and Sanders when keeping accounts and preparing tax returns for a number of corporations, including TWA and Gulf Coast News. William Boshell, who succeeded Golden as accountant, testified that Walter and Sanders both supplied him with the business records of the various corporations. He said that Walter, Sanders and all the corporations had their offices at TWA and added that he was paid with a TWA check for services rendered to the other businesses.

John Catoe, an employee of Walter and Sanders, related at trial that both men told him in 1973 that they were planning a new corporation to distribute sexually explicit materials and that Sanders later stated that this corporation was TWA. According to Catoe he and all other TWA employees received work instructions from both Walter and Sanders. Catoe also said that when the two men sent him to Florida to manage a new bookstore in June 1975, they explained that Gulf Coast News had been established to supply their Florida operations. In addition, Catoe stated that Walter gave him expense money and ordered him to follow the directions of Richard Larson, the manager of Gulf Coast

News, whom Catoe had met at TWA when Larson was being trained. Ronald Bowman, the Gulf Coast News employee who delivered the "David's Boys" films to Greyhound's St. Petersburg terminal, testified that on one visit to the Gulf Coast News warehouse Sanders was introduced as the man "[y]ou will be working for" and that on another occasion Walter was introduced as Sanders' partner. Bowman also recalled that Richard Larson described the two as partners and identified as theirs the desks in the back of the warehouse. Finally, Carol Maxey, Sanders' former girl friend, testified that Sanders told her that he and Walter jointly owned a number of businesses, including Gulf Coast News.

Given the foregoing testimony describing Walter's central role in the management of TWA, Gulf Coast News and other companies involved in the distribution and sale of hardcore pornography, we do not believe that "the jury must necessarily have had a reasonable doubt" that he possessed the requisite scienter, *United States v. Warner,* 5 Cir., 1971, 441 F.2d 821, 825, *cert. denied,* 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). Accordingly, we conclude that there was sufficient evidence to support Walter's conviction.

III. The District Court's Instructions on Contemporary Community Standards.

Finally, appellants challenge the district court's jury instructions regarding the community standards element of the definition of obscenity. They contend that *Pinkus v. United States,* 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978) and our subsequent decision in *United States v. Bush, supra,* required the trial judge expressly to charge the jury not to consider children in determining the contemporary standards

of "the average person of the community as a whole." We reject appellants' expansive reading of *Pinkus* and *Bush* and find no error in the district court's instructions.

In *Pinkus,* the trial judge had charged the jury that, in ascertaining community standards, " 'you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and *children,* from all walks of life.' " *Pinkus v. United States, supra,* 436 U.S. at 296, 98 S.Ct. at 1811 (emphasis added). The Supreme Court elected "to take this occasion to make clear that children are not to be included for these purposes as part of the 'community' as that term relates" to the definition of obscenity and therefore held that "it was error to instruct the jury that . . . [children] were a part of the relevant community." *Id.* at 1812. Similarly, in *Bush* the district court had told the jury that "you are to consider the community as a whole, *young and old,* educated and uneducated, religious and irreligious." (emphasis added). In holding that this charge constituted reversible error, we reasoned that inclusion of "[t]he phrase 'young and old' . . . provides a jury ample freedom to consider children, and thus does not completely avoid the danger, emphasized in *Pinkus,* that 'the adult population [will be reduced] to reading only what is fit for children.' " (citation omitted) 582 F.2d at 1021-22.

Here, however, unlike the instructions in *Pinkus* and *Bush,* the trial judge's charge did not prescribe jury consideration of "children" or "young people" in determining community standards. The district court told the jurors to judge the obscenity of the films by whether their "predominant appeal . . . viewed in [their] entirety, is to the prurient interest of *the average person of the community as a whole,* or the prurient interest of a deviant sexual group, as the case might

be, and is so patently offensive that it is utterly without redeeming social value." (emphasis added). The judge further explained that "[w]hether the predominant theme or purpose of the material is an appeal to the prurient interest of the 'average person of the community as a whole' is a judgment which must be made in light of contemporary standards as would be applied by the average person with an *average and normal attitude toward, and an average interest in sex."* (emphasis added). This instruction adequately directed jury consideration to the contemporary standards of adults and thereby avoided the danger emphasized in *Pinkus* and *Bush.*

We have carefully examined appellants' remaining assertions[10] and conclude that they are meritless. Accordingly, we affirm the judgments of conviction as to all appellants.

AFFIRMED.

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[10]Appellants also contend, individually or in unison, that by accepting and holding the whole shipment of films the Government engaged in prior restraint in violation of the first amendment, that the trial judge should have granted a change in venue, that he erred in refusing to admit comparison evidence and that the district court should have compelled the prosecution to present expert witnesses. In addition, they assert numerous errors in the trial judge's other rulings on pretrial and trial motions and in his instructions to the jury and argue that the voir dire conducted by the court was insufficient. Finally, Walter urges that the prosecution was guilty of prejudicial misconduct, that juror misconduct also prejudiced appellants, that the district court erred in denying his motion for severance and that the films were not obscene.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent. Today the Court holds that the government may take possession of 12 cartons containing 871 films, view the films two months later, retain them for yet another two months - without obtaining a warrant at any point - if the films are the fruit of a private search. The majority reaches the conclusion that the FBI's acquisition of the films in this case falls short of a "seizure" without considering the first amendment interest at stake when expressive matter is taken out of circulation by the government. "The Fourth Amendment . . . must not be read in a vacuum". *Roaden v. Kentucky,* 1973, 413 U.S. 496, 501, 93 S.Ct. 2796, 37 L.Ed.2d 757. In my view, the approach of the Eighth Circuit Court of Appeals in *United States v. Kelly,* 1976, 529 F.2d 1365, represents the proper accomodation of the first and fourth amendments. I would reverse the defendants' convictions on the ground that the films were seized in violation of the fourth amendment and, therefore, were illegally admitted into evidence.

I.

The majority presents the facts accurately but not completely. A longer look at the events that occurred once the employees of L'Eggs Products, Inc. notified the FBI of the receipt of the shipment of films leads me to the conclusion that the defendants retained a constitutionally protectible interest in the films that was impermissibly intruded upon by the government.

On September 26, 1977, Michael Horton, area manager for L'Eggs, pried open one of twelve packages, which were so unusually securely wrapped and reinforced that they did not

look "normal" to him. He discovered that the carton contained film boxes with various sexual scenarios described on the covers. Horton passed on this information to his branch manager, William Fox. Fox then went to the Greyhound terminus, informed the Greyhound employee in charge that the boxes did not belong to L'Eggs, but took them with him anyway, without, however, paying the collect charges. Later, Fox informed FBI agent Mandyk of the incident. Mandyk told Fox to put the cartons aside until he arrived. He also asked the L'Eggs employees to obtain the name of anyone who called to inquire about the packages.

Meanwhile, the defendants made several attempts to find their shipment. One of the defendants called Greyhound to report that the packages were missing. He put a tracer on the shipment, leaving his name and telephone number with Greyhound. During the next few days several of the defendants visited the Greyhound station. Although the assistant terminal manager knew that the packages had been taken to the L'Eggs office, on the instructions of the FBI he did not provide the defendants with this information. Instead, he told the FBI about the inquirers. The defendants also called the L'Eggs office. They, too, denied that they had the shipment.

Five days after Fox called the FBI, two agents arrived at the L'Eggs office and took possession of the packages and their entire contents. Two months later Agent Mandyk screened each of the 871 films on an office projector.There were twenty-five title films; the remaining 846 films were copies. Another two months elapsed before the FBI turned the films over to the United States Attorney's office. Over a year later the indictments were returned. Of the twenty-five title films, the government charged that five were obscene.

II

The major teaching of the Supreme Court's decisions in the obscenity area is that some form of judicial procedure "designed to focus searchingly on the question of obscenity" must precede governmental interference with material arguably within the protection of the first amendment. *See Heller v. New York,* 1973, 413 U.S. 483, 489, 93 S.Ct. 2789, 37 L.Ed.2d 745; *A Quantity of Books v. Kansas,* 964, 378 U.S. 205, 210, 84 S.Ct. 1723, 12 L.Ed.2d 809: *Marcus v. Search Warrant of Property,* 1961, 367 U.S. 717, 732, 81 S.Ct. 1708, 6 L.Ed.2d 1127. Because the FBI did not apply to a magistrate for a warrant at any point, the only judicial determination of obscenity was made at the trial on October 21, 1977 - over two years after the 871 films were taken out of circulation by the government. Yet the majority relegates to a footnote the defendants' contention that there was an illegal prior restraint. *See* note 10 of the majority opinion.

I must assume from the majority's dismissal, without discussion, of the issue of prior restraint that it agrees with the government that there is no first amendment interest at stake in this case. Before this Court, the government argued that the films were not entitled to the protection of the first amendment because they were furtively distributed. When taken, the films were neither being sold nor exhibited to the general public; hence, the government reasons, the public's first amendment right of access to nonobscene matter was not infringed. To support its contention that films enjoy no special constitutional status unless they are available to the general public, the government relies on language in a decision of the Second Circuit Court of Appeals. "This was strictly an underground operation in hard core pornography with clandestine storage

facilities not intended to be available to the public. . . The 'setting' then is hardly such as to presumptively invoke first amendment protection." *United States v. Cangiano,* 2 Cir. 1974, 491 F.2d 906, 913, *cert. denied,* 419 U.S. 904, 95 S.Ct. 188, 42 L.Ed.2d 149.

It is, of course, true that the procedural safeguards required by the first amendment vary with "the nature of the materials seized and the setting in which they are taken". *Roaden v. Kentucky,* 1973, 413 U.S. 496, 503, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757. A prior adversary hearing must be held before a large quantity of expressive material is seized by the government for the purpose of destruction. *See A Quantity of Books v. Kansas,* 1964, 373 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809; *Marcus v. Search Warrant of Property,* 1961, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; *Lee Art Theatre v. Virginia,* 1968, 392 U.S. 636, 88 S.Ct. 2103, 2104, 20 L.Ed.2d 1313 (per curiam). "[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding." *Heller v. New York,* 1973, 413 U.S. 483, 492, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745. Such a seizure is permissible if a neutral magistrate issuing the warrant determines that there is probable cause to believe that the film is obscene and an adversary hearing is available promptly after the seizure.

When films are not subject to absolute suppression, in the sense of destruction, and the public interest in free circulation of the films is attenuated, less stringent procedural limitations on governmental action may be justified. This does not mean, however, that films furtively distributed to a small cadre of customers lose all constitutional protection

and may be treated by the government as if they were contraband or ordinary instruments of a crime. The protection of the first amendment cannot turn solely on the size of the audience that expressive matter will reach. History teaches that the first amendment is concerned not only with the public's right of access but also with the right of unpopular and small minorities to express their views. Nor should first amendment protection hinge on the method of dissemination, for unpopular minority views are most likely to be disseminated in a furtive and clandestine fashion. *See United States v. Alexander,* 8 Cir. 1970, 428 F.2d 1169, 1175; Note, *The Right to an Adversary Hearing on the Issue of Obscenity Prior to the Seizure of Furtively Distributed Films,* 69 Mich.L.Rev. 913, 926-40 (1971).

Indeed, the question before the Second Circuit Court of Appeals in *Cangiano* was not whether the films were presumptively under the protection of the first amendment. The FBI obtained a warrant before seizing the material and an adversary hearing was available upon request by the defendant. The Court merely held that the "setting" was not such as to invoke the requirements of a prior adversary hearing before seizure. I do not know any cases, certainly not in this Circuit, holding that the taking of furtively distributed films raises no first amendment concerns at all. Such a proposition would be startling in light of the Supreme Court's decision in *Heller v. New York,* 1973, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745. There, a single copy of a film was seized. Because other copies were available for screening to the public, there was no restriction on the public's right of access. Yet, the Court held that the copy could be seized as evidence only if the government observed strict procedural

safeguards.[1] "The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be considered in light of First Amendment guarantees." 413 U.S. at 493, 93 S.Ct at 2795.

I have elaborated on decisions in the area of obscenity and prior restraints to demonstrate that the defendants had a legitimate first amendment interest in the films at the time they were taken by the FBI. I do not decide whether the restraint imposed in this case was so extensive that an adversary hearing should have been held before the films were taken. It is unnecessary to decide that question because the government did not observe the minimum procedural safeguards demanded by the Supreme Court in *Heller.* I point out, however, that unlike *Heller* the amount of material taken by the FBI in this case must be termed "massive". The retention of 846 copies far exceeds the requirements of officers seeking to pursue criminal charges. Moreover, we do not know whether the films were earmarked for storage in a warehouse or whether they were on the threshold of dissemination. One cannot assume, therefore, that the FBI's actions did not block the orderly distribution of the films. And in that circumstance, the Supreme Court has implied that the requirements of *A Quantity of Books* must be met. *Heller v. New York,* 1973, 413 U.S. at 492, 93 S.Ct. 2789.

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[1]The first articulation of the view that furtively distributed films are entitled to no first amendment protection was in a district court opinion. *United States v. Pryba,* D.D.C. 1970, 312 F.Supp. 466. There, too, a warrant was obtained before seizure of the films. The decision of the district court was upheld by the District of Columbia Court of Appeals on the alternative theory that the requirements of *Heller* were satisfied. *United States v. Pryba,* 1974, 163 U.S.App.D.C. 389, 412-13, 502 F.2d 391, 404-05.

III.

Given the special constitutional character of the items taken by the FBI, I see two mutually supporting reasons that compel application of the exclusionary remedy in this case.

In the first place, the first amendment is an independent source of restrictions upon the power of the police to take expressive material. For example, because of first amendment concerns, a film cannot be seized as an incident to a lawful arrest. *Roaden v. Kentucky,* 1973, 413 U.S. 497, 93 S.Ct. 2796. This is true even though the fourth amendment is generally understood to permit the seizure of items during a lawful arrest. *Chimel v. California,* 1969, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. As the court explained in *Roaden,* the seizure of a copy of a film "by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint". 413 U.S. at 504, 93 S.Ct. at 2801. "The seizure proceeded solely on the police officer's conclusions that the film was obscene: there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.'" 413 U.S. at 506, 93 S.Ct. at 2802. Thus, to supply the necessary judicial determination of obscenity, the Supreme Court harnessed the fourth amendment procedural guarantee of a neutral magistrate.[2]

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[2]The Supreme Court has also held that the first amendment imposes its own, more stringent limitations on obtaining and executing a search warrant. A judicial warrant for the seizure of a film may not be issued "solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions." *Lee Art Theatre, Inc. v. Virginia,* 1968, 392 U.S. 636, 637, 88 S.Ct. 2103, 2104, 20 L.Ed.2d 1313 (per curiam); *Marcus v.*

Functionally, the government's acceptance of the films in this case resembles a "seizure" resulting in a prior restraint. It is a nonjudicially imposed suppression of expressive matter. Like a seizure "proceed[ing] solely on the police officer's conclusions", the acceptance and retention of the films wholly frustrated the exercise of first amendment rights without any searching inquiry by a magistrate into the merits of the first amendment claim. It is imperative, therefore, to view the acquisition of these films by the FBI as a "seizure" subject to the procedural guarantees of the fourth amendment.[3]

The suppression of the films as evidence is also justified under traditional fourth amendment doctrine.

I start from the premise that the defendants had a constitutionally protectible privacy interest in the packages

Search Warrant of Property, 1961, 367 U.S. 717, 731-32, 81 S.Ct. 1708, 6 L.Ed.2d 1127. Furthermore, where books are seized, a heightened degree of specificity in a search warrant's description of "things to be seized" is required. *Stanford v. Texas,* 1965, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431. "But where the special problems associated with the First Amendment are not involved . . . a more 'reasonable particularity' . . . is permissible." *Berger v. New York,* 1967, 388 U.S. 41, 98, 87 S.Ct. 1873, 1904, 18 L.Ed.2d 1040. (Harlan, J., dissenting).

[3]Professor Monahan suggests a similar analysis with respect to warrantless arrests. Viewing the first amendment as a source of restrictions upon the power of the police to seize persons as well as things, he argues that the police should be prohibited from arresting those committing offenses in their presence when the offenders are exhibitors or distributors of arguably first amendment protected matter. "Functionally, an arrest resembles a nonjudicially imposed injunction against certain conduct; . . . here, there is not even the barest judicial inquiry before the damage is done." Monahan, First Amendment "Due Process", 83 Harv.L.Rev. 518, 538 (1970).

before they were discovered by the employees of L'Eggs. The district court held that shipping material by means of a common carrier to a fictitious consignee amounted to a relinquishment or abandonment of any reasonable expectation of privacy. The majority agrees with this conclusion. *See* page 791 of the majority opinion. The increased likelihood that the parcel would be misdelivered cannot be equated with an abandonment of all reasonable expectations of privacy. Misdelivered packages are usually returned; indeed, they are usually returned unopened. The careful manner in which the films were wrapped in individually sealed containers as well as the use of a fictitious cover name for the addressee demonstrates, instead, a strong desire to maintain the defendants' interest in privacy, to avoid the contents getting into the wrong hands, and to continue ownership of the films or a possessory interest in the films until their delivery into the right hands.

The initial search of these films was by private parties and was, therefore, outside the scope of the fourth amendment. *Burdeau v. McDowell,* 1921, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed.2d 1048. A search, however, is merely the first step in an invasion of privacy that ends with the introduction in court of incriminating evidence. When the initial search is conducted by private parties, the question remains whether governmental conduct after that point amounts to an independent invasion of the right of privacy controlled by the standards of the fourth amendment. *See generally* Note, *Private Searches and Seizures,* 90 Harv.L.Rev. 463 (1976).

The majority also does not hold that fourth amendment issues were automatically exhausted once the initial private search was completed. The Court scrutinizes separately

whether the government's viewing of the films discovered in the private search was an additional "different" search, concluding that when the FBI agent screened films, the obscene content of which had already been ascertained by the employees of L'Eggs, he "did not 'change the nature of the search [4]' ". The majority refuses, however, to test the government's acquisition of the films against the same standard. Without examining the nature of the FBI's actions in taking and retaining the fruits of the private search, the Court holds that it was not a "seizure"; it was no more than a passive acceptance of an accomplished fact.

The government's acquisition of the fruits of the private search must be termed a "seizure" because it interfered with the defendants' interest in the films in a new and different way. "It constituted a deprivation of the defendants' property interests". *See* Note, *Private Searches and Seizures, supra* at 469. The defendants had a legitimate possessory interest in the films acquired by the FBI until a judge, jury, or neutral magistrate issuing a warrant established probable obscenity. They had, therefore, a reasonable expectation of freedom from governmental interference with these films. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, book II, Ch. 1, and one who owns or lawfully possesses . . . property will in

[4]Although I believe that the FBI's examination of the films at the L'Eggs office was not an independent "search" subject to the fourth amendment, I cannot agree with the majority's conclusion that the later screening of the films at the office of the FBI was merely a continuation of the private search. *See* text pp. 803-804 *infra*.

all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas v. Illinois,* 1978, ____ U.S. _____, 99 S.Ct. 421, 58 L.Ed.2d 387, 401, n.12. This expectation is protected by the fourth amendment.

It is true that when the employees of L'Eggs took the packages from the common carrier and opened them, the defendants' ordinary privacy interest in the packages, in the sense of their desire to insulate the contents of the packages from the eyes of others, was infringed. That interest was not affected in any new way by the FBI's observance of the contents of the packages at the L'Eggs office.[5] But the defendants' retained a possessory interest in the films themselves, because they had a reasonable expectation that the packages would be retrieved after misdelivery or returned by the private parties to the common carrier. They also had a reasonable expectation that the films would be returned to them by the government pending a judicial determination of obscenity. Thus, they had a right to exclude the government from taking possession of the films. When the FBI appropriated the films, it abruptly and completely interfered with these legitimiate expectation. The appropriation of the films was, therefore, a "seizure".

The majority contends, nevertheless, that the Eighth Circuit's characterization, in *Kelly,* of the government's acceptance of the films as a "seizure" contradicts a long line of decisions by the Supreme Court and this circuit. None of the cases cited by the majority, except *Sherwin v. United States,* 9 Cir. 1976, 539 F.2d 1, addresses the taking of material presumptively protected by the first amendment.

[5]*See* note 4 *supra*.

And it is worth noting that, in *Sherwin,* the FBI immediately obtained a warrant to seize a shipment of books after it accepted two copies of printed material discovered in the private search. Furthermore, none of the cases cited by the majority undertakes a separate fourth amendment analysis of the government's acquisition of the items discovered in the private search.

Over fifty years ago the Supreme Court held in *Burdeau v. McDowell, supra,* over a dissent by Justices Brandeis and Holmes, that papers stolen by a thief and turned over to the government could be used as evidence at trial. The Court did not explicitly consider whether the government's acceptance of the papers was a seizure.Commentators have cast doubt on the continued vitality of the *Burdeau* rule in its broadest sense. It permits the government to accomplish circuitously what it could not accomplish directly. In other words, it is the twin of the "silver platter" doctrine that allowed federal prosecutors to use illegal evidence independently obtained by state and local officers. *See generally* Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch,* II, 52 Tex.L.Rev. 621, 661 (1974); Note, *The Fourth Amendment Right of Privacy: Mapping the Future,* 53 Va.L.Rev. 1314, 1336-59 (1969). The "silver platter" doctrine was abandoned nearly thirty years after *Burdeau* was decided. *Elkins v. United States,* 1960, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669. Moreover, when *Burdeau* was decided, there were few justifications for warrantless seizures. "The failure of *Burdeau* to subject the government's acceptance of privately discovered objects to fourth amendment analysis gave the police a desirable freedom of action. Under current fourth amendment doctrine, the exceptions to the warrant require-

ment . . . permit the police to take immediate action where their protective and law enforcement duties most demand it." Note, *Private Searches and Seizures, supra,* at 469.

The Fifth Circuit cases cited by the majority are primarily concerned with whether there was a "separate or additional *search"* by the government. *See United States v. Blanton,* 5 Cir. 1973, 479 F.2d 327, 328 (emphasis added); *United States v. Lamar,* 5 Cir. 1977, 545 F.2d 488. The majority argues, however, that the introduction into evidence of the fruits of the private search would have been impossible in each of these cases unless the government's acceptance of the articles turned over by the private parties was implicitly immunized from the fourth amendment. Yet in each of the cases the actual seizure of the items can be justified under traditional exceptions for warrantless seizures For example, in *Lamar,* an airport official discovered heroin in a bag left by a passenger at the airport. He showed the contents of the bag to the police.When the passenger reclaimed the bag later that night, he was arrested. The bag could have been taken into possession by the police as an incident to a lawful arrest.[6]

In this case, the warrantless seizure cannot be justified under existing exceptions to the warrant clause.The employ-

[6] The FBI's acceptance of a bag containing a silencer, discovered in a private search at the airport, in *United States v. Blanton,* 5 Cir. 1973, 479 F.2d 327, was also "reasonable" because it was incident to a lawful arrest and because exigent circumstances justified the warrantless seizure. 479 F.2d at 328. Thus, other circuits have scrutinized the reasonableness of governmental takings of objects in a private search directly under the fourth amendment. *See, e.g., United States v. Ogden,* 9 Cir. 1973, 485 F.2d 536, 540; *United States v. Tripp,* 9 Cir. 1972, 468 F.2d 569, 570, *cert. denied,* 1973, 410 U.S. 910, 93 S.Ct. 965, 35 L.Ed.2d 272.

ees of L'Eggs had no authority to consent to the government's appropriation of the presumptively lawful contents of the package. The seizure cannot be justified under the plain view doctrine. *See United States v. Kelly,* 8 Cir. 1976, 529 F.2d at 1372-73. There were no exigent circumstances necessitating immediate action. The FBI had ample opportunity to secure a warrant on the basis of an affidavit by either the FBI agents or the employees of L'Eggs. The seizure was, therefore, unreasonable.

IV.

When evidence is seized in violation of the fourth amendment, the constitutional remedy is the suppression of the illegally obtained evidence. The exclusion of the films as evidence, rather than the return of the films to the owners, is the proper remedy in this case. This is true even though the source for characterizing government action as a seizure is primarily the first amendment[7] and even though the principal

[7] Many courts, including a panel of this Circuit have held that " '[w]hen materials are seized in violation of the first amendment, the appropriate remedy is return of the seized property, but not its suppression as evidence at trial' ". *United States v. Bush,* 5 Cir. 1978, 582 F.2d 1016, 1021. *See also United States v. Sherwin,* 9 Cir. 1976, 539 F.2d 1.8 n. 11; *United States v. Cangiano,* 2 Cir. 1972, 464 F.2d 320, 328 *vacated on other grounds,* 1973, 413 U.S. 913, 93 S.Ct. 3047, 37 L.Ed.2d 1023, *on remand,* 2 Cir.,491 F.2d 905, *cert. denied,* 1974, 418 U.S. 934, 94 S.Ct. 3223, 41 L.Ed 2d 1171; *Tyrone, Inc. v. Wilkinson,* 4 Cir. 1969, 410 F.2d 639, 641; *Metzger v. Pearcy,* 7 Cir. 1968, 393 F.2d 202, 204. These cases are concerned with the seizure of expressive matter pursuant to a warrant but without a prior adversary hearing. The courts have reasoned that the exclusionary rule does not apply where a seizure is defective for lack of an adversary hearing because "the primary right involved is the public's First Amendment right of access, rather than the defendant's Fourth Amendment immunity

interest infringed in this case is a possessory one.[8] When the government obtains films discovered in a private search and retains them, without the knowledge of the owner, for a considerable period of time, the remedy of return comes too late. The owners did not know where the films were. Indeed, the government took pains to ensure that the defendants would not be able to locate the films. The defendants could not ask the government to return the films until they were informed that the government had taken possession of their packages.

from unreasonable search and seizure". *Huffman v. United States,* 1972, 152 U.S.App.D.C. 238, 244, 470 F.2d 386, 392.

At least one court has recognized, however, that the Supreme Court's decisions in *Heller* and *Roaden* may obliterate any distinction between violations of the first and fourth amendments when a seizure of expressive matter is defective for lack of a determination of probable obscenity by a neutral magistrate. *See United States v. Pryba,* 1974, 163 U.S.App.D.C. 389, 402, 502 F.2d 391, 404 n. 97.

[8] In *Sherwin,* the Ninth Circuit Court of Appeals suggested that "when objects found in a private search are turned over to the government, then, only the property interests of the owner are implicated. A motion for return of the objects is a proper means of asserting these interests". 539 F.2d at 8, n. 10. Because, according to the Sherwin court, " 'the principal object of the Fourth Amendment is the protection of privacy rather than property,' " *Warden v. Hayden,* 1967, 387 U.S. 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782. . . . "[e]ven when there is a governmental seizure, suppression as evidence may not be the proper remedy if only property rights are affected and there has been no governmental invasion of privacy." 539 F.2d at 8, n. 10.

The *Sherwin* court's preference for the remedy of return of the objects rather than their exclusion from evidence at trial is based on a mistaken view that possessory interests have no role in delineating reasonable expectations of privacy. On the contrary, recent Supreme Court decisions have emphasized that there is no abstract concept of privacy and that the concept of legitimate property intersts can define more concretely the scope of the fourth amendment. *See e.g. Rakas v. Illinois,* 1978,———U.S.———99 S.Ct. 421, 58 L.Ed.2d 387, *quoted* in text, p. 801, *supra.*

This information was conveyed, at the earliest, more than a year after the films were acquired by the FBI.[9] Moreover, the Surpreme Court has implicitly recognized, in *Roaden,* that the exclusionary rule is the most effective deterrent to unlawful government action affecting freedom of expression. Observing that the " 'use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new . . . ' " 413 U.S. at 506, 93 S.Ct. at 2802, *citing Marcus v. Search Warrant of Property,* 1961, 367 U.S. 717, 729, 81 S.Ct. 1708, 6 L.Ed.2d 1127, the Court reversed a conviction based on the admission into evidence of films seized incident to a lawful arrest. Therefore, I would reverse the convictions of the defendants in this case.

V.

I would also reverse the convictions of the defendants on the ground that the FBI conducted an independent search, prohibited by the fourth amendment, after acquiring the films.

Relying on language in *United States v. Haes,* 8 Cir. 1977, 551 F.2d 767, the majority holds that the screening of the films on a projector at the office of the FBI was not a separate, independent search because the L'Eggs employees, unlike the private searches in *Haes,* had already ascertained

[9]Return of the objects may have been an appropriate remedy in the circumstances of *Sherwin.* In that case, the owners were immediately informed that the government had taken possession of two copies of obscene material. Moreover, when the FBI applied for a warrant the following day, to seize the remainder of the shipment, the magistrate ordered that notice be given to the defendants.

the nature of the films from the box covers and were able to make "a determination of possible obscenity prior to turning the films over the the FBI." 551 F.2d at 772. The "sense impressions or legal conclusions" of the employees of L'Eggs have no place in determining whether the FBI agents conducted a new or different search. *See United States v. Haes,* 551 F.2d at 773 (Webster, J., dissenting). The question whether the films were obscene bears only on the issue of probable cause to search and seize the films; and that determination must be made by a neutral magistrate issuing a warrant.

Nor can I agree with the majority that the FBI's viewing of the films on a screen was merely a continuation of the private parties' observation of the box covers because, as it turned out, the covers accurately reflected their contents. The two-month hiatus between the private search and the governmental screening negates any assumption that one continuous search took place. *Cf. Coolidge v. New Hampshire,* 1971, 403 U.S. 443, 458, 464, 91 S.Ct. 2022, 29 L.Ed.2d 564. Each of the cases cited by the majority deal, instead, with governmental viewing of material immediately after being called to the scene of the private search by the private parties. *See United States v. McDaniel,* 5 Cir. 1978, 574 F.2d 1224; *United States v. Blanton,* 5 Cir. 1973, 479 F.2d 327; *United States v. Pryba,* 1974, 163 U.S.App.D.C. 389, 399, 502 F.2d 391, 401; *United States v. Ford,* 10 Cir. 1975, 525 F.2d 1308, 1312, Second, as in *Haes,* the FBI's actions in viewing the films two months later must be characterized as "initiating and carrying out their own inspection of the films for their own purposes." 551 F.2d at 771. If the descriptions on the box covers are an infallible guide to the contents of the films there would have been no need to retain the films for two months before making them

available to the United States Attorney's office.

Contrary to the majority, I see no basis for distinguishing the Supreme Court's decision in *United States v. Chadwick,* 1977, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538, from the instant case. See note 7 of the majority opinion. In *Chadwick,* the Supreme Court held that the FBI could not search the contents of a footlocker after it took exclusive custody of the item without obtaining a warrant. Before the FBI took exclusive possession of the items in this case, the L'Eggs employees had viewed the film boxes but had not opened the boxes or viewed their contents. True, there was probable cause to believe that the boxes contained obscene films. But in *Chadwick,* too, there was probable cause to believe that the footlocker contained contraband - and the search validated this assumption. In this case, therefore, as in *Chadwick,* a judicial warrant must be obtained before the containers can be searched.

VI.

The *Burdeau* rule has spawned much critical literature.[10] Today, the Court extends that rule into an area where the constitutional requirements of the fourth amendment are to be "accorded the most scrupulous exactitude". *Stanford v. Texas,* 1965, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431. Placing the government's acceptance of expressive materials outside the scope of the fourth amendment, by

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[10]*See, e.g.* Black, *Burdeau v. McDowell - A Judicial Milepost on the Road to Absolution,* 12 B.U.L.Rev.32 (1932); Note, *Seizures by Private Parties: Exclusion in Criminal Cases,* 19 Stan.L.Rev. 608 (1967); Note, *The Fourth Amendment Right of Privacy: Mapping the Future,* 53 Va.L.Rev. 1314, 1336-59 (1969).

"cast[ing] the government in the role of a passive receiver . . . absolve[s] the government of any first amendment responsibilities or restrictions . . . [It] allows for the possibility of government-sanctioned private censorship without judicial supervision." Note, *Private Searches and Seizures, supra* at 467. In short, the majority rule frustrates the Supreme Court's efforts to utilize the fourth amendment as a source of procedural guarantees aimed at controlling governmental action that affects freedom of expression. The approach of the Eighth Circuit Court of Appeals in *Kelly,* which subjects the government's taking of expressive materials discovered in a private search to the scrutiny of the fourth amendment, properly guards both the first amendment rights and the privacy interests of absent third parties.

Therefore, I respectfully dissent.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

By: _____

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